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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JUDY A. USELTON-NORD,
Plaintiff,

Civil No. 09-805-AA
OPINION AND ORDER

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

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3 AIKEN, Chief Judge:

4 Claimant, Judy Uselton-Nord, brings this action pursuant to
5 the Social Security Act (the Act), 42 U.S.C. § 405(g) to obtain
6 judicial review of a final decision of the Commissioner denying
7 her application for disability insurance benefits under Title II
8 of the Act. For the reasons set forth below, the Commissioner's
9 decision is reversed and remanded for payment of benefits.

10 **PROCEDURAL BACKGROUND**

11 Plaintiff protectively filed an application for disability
12 benefits on March 10, 2004, alleging disability beginning March
13 13, 2004. Tr. 73-76. An administrative law judge (ALJ) issued
14 a decision that resulted in a remand by the Appeals Council. The
15 remand was allowed in order to complete the record by obtaining
16 evidence concerning plaintiff's back and knee pain; as well as
17 anxiety and depression. Following a hearing on remand, the ALJ
18 issued a partially favorable decision dated January 30, 2008,
19 finding plaintiff disabled beginning November 1, 2007, but not
20 prior to that date. Tr. 12-28. Plaintiff requested review of
21 that decision, however, the Appeals Council denied plaintiff's
22 request. Tr. 6-8. Therefore, the ALJ's decision became the
23 final agency decision.

24 **STATEMENT OF THE FACTS**

25 Plaintiff was born in 1958 and alleged a combination of
26 mental and physical impairments including depression, anxiety,
27 degenerative disc disease of the lumber spine, degenerative joint
28 disease of the knees, obesity, and mixed stress and urinary

1 incontinence associated with pelvic floor relaxation including
2 cystocele and rectocele. At all relevant times, plaintiff was
3 considered a "younger individual." Plaintiff has a GED
4 education. As noted above, the ALJ found plaintiff disabled
5 beginning November 1, 2007. Therefore, a four year period
6 remains at issue for this court, beginning March 13, 2003,
7 through October 31, 2007.

8 STANDARD OF REVIEW

9 This court must affirm the Secretary's decision if it is
10 based on proper legal standards and the findings are supported by
11 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
12 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
13 mere scintilla. It means such relevant evidence as a reasonable
14 mind might accept as adequate to support a conclusion."
15 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
16 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
17 The court must weigh "both the evidence that supports and
18 detracts from the Secretary's conclusion." Martinez v. Heckler,
19 807 F.2d 771, 772 (9th Cir. 1986).

20 The initial burden of proof rests upon the claimant to
21 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
22 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
23 an "inability to engage in any substantial gainful activity by
24 reason of any medically determinable physical or mental
25 impairment which can be expected . . . to last for a continuous
26 period of not less than 12 months. . . ." 42 U.S.C. §
27 423(d)(1)(A).

28 The Secretary has established a five-step sequential

1 process for determining whether a person is disabled. Bowen v.
2 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
3 416.920. First the Secretary determines whether a claimant is
4 engaged in "substantial gainful activity." If so, the claimant
5 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§
6 404.1520(b), 416.920(b).

7 In step two the Secretary determines whether the claimant
8 has a "medically severe impairment or combination of
9 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
10 §§ 404.1520(c), 416.920(c). If not, the claimant is not
11 disabled.

12 In step three the Secretary determines whether the
13 impairment meets or equals "one of a number of listed impairments
14 that the Secretary acknowledges are so severe as to preclude
15 substantial gainful activity." Id.; see 20 C.F.R. §§
16 404.1520(d), 416.920(d). If so, the claimant is conclusively
17 presumed disabled; if not, the Secretary proceeds to step four.
18 Yuckert, 482 U.S. at 141.

19 In step four the Secretary determines whether the claimant
20 can still perform "past relevant work." 20 C.F.R. §§
21 404.1520(e), 416.920(e). If the claimant can work, she is not
22 disabled. If she cannot perform past relevant work, the burden
23 shifts to the Secretary. In step five, the Secretary must
24 establish that the claimant can perform other work. Yuckert, 482
25 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
26 If the Secretary meets this burden and proves that the claimant
27 is able to perform other work which exists in the national
28 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

DISCUSSION

Plaintiff's Allegations of Error

1. Findings from Drs. Lundquist and Condon

Plaintiff alleges that the ALJ failed to comply with Agency regulations governing the evaluation of mental impairments and therefore committed reversible error. For the period beginning with plaintiff's alleged onset date, the ALJ found, among other things, that plaintiff had the severe impairments of "anxiety/depression." Tr. 18. For the period pre-dating November 1, 2007, the ALJ made no findings whatsoever regarding the degree to which plaintiff was limited in terms of mental impairments (activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation). Moreover, for that same time period, the ALJ failed to make any mental residual functional capacity ("RFC") findings.

Pursuant to 20 C.F.R. §§ 404.1520a(b)-(d), the ALJ is required to show:

the significant history, including examination and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s). The decision must include a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c) of this section.

20 C.F.R. § 404.1520a(e)(2).

Instead of reviewing the four broad functional areas noted above, for the period pre-dating November 1, 2007, the ALJ stated the following:

The claimant's physical impairments do not meet the criteria of any listed impairment. Her mental impairments do not result in marked functional limitations

1 or episodes of decompensation as required under the
2 "B" criteria of sections 12.04 and 12.06 of the
3 listing of impairments. Evidence does not establish
4 the presence of the "C" criteria. No physician
5 has opined that her impairments are equal to a
6 listed impairment.

7 Tr. 19.

8 The ALJ failed to discuss or rate plaintiff's degree of
9 functional limitation in the four broad functional areas.
10 Therefore, the ALJ had no legal or factual basis upon which to
11 assess whether plaintiff's mental impairment was "severe" at step
12 two; she had no legal or factual basis upon which to assess
13 whether plaintiff's mental impairments met or equaled a listed
14 impairment at step three; and she had no legal or factual basis
15 upon which to assess plaintiff's mental residual functional
16 capacity (or the vocational consequences thereof) at step four.

17 The ALJ further failed to comply with SSR 83-20 in
18 establishing the onset of plaintiff's disability. The record
19 shows that on November 1, 2007, Dr. Gordon diagnosed plaintiff
20 with "[m]ixed stress and urgency incontinence which has been
21 worsening over the last ten years, associated with pelvic floor
22 relaxation including cystocele and rectocele." Tr. 296. Dr.
23 Gordon also stated that when she first examined plaintiff in
24 August 2002, plaintiff was "reporting urinary incontinence that
25 had been present for about five years, and was both stress and
26 urgency in type." Tr. 294. The ALJ failed to obtain the records
27 from August 2002. Without those records and relying solely on
28 part of Dr. Gordon's November 1, 2007, report, the ALJ found:

29 Although claimant alleges incontinence for many years,
30 her allegations are not supported by the treatment
31 record Although [Dr. Gordon] indicated
32 [plaintiff's] incontinence had been worsening over

1 the last 10 years, treatment records do not establish
2 a diagnosis of incontinence prior to the November 1,
3 2007 report. There is no evidence of medically
4 determined incontinence prior to November 1, 2007.
5 As of November 1, 2007, her incontinence is a severe
6 impairment.

7 Tr. 18-19.

8 Plaintiff last performed substantial gainful activity in
9 March 2003, and alleges disability since that time. The ALJ
10 should have inquired of Dr. Gordon regarding plaintiff's onset
11 and severity of her limitations prior to November 1, 2007, when
12 Dr. Gordon actually examined plaintiff. SSR 83-20 addresses the
13 need to infer the disability onset date from medical and other
14 evidence. "With slowly progressive impairments, it is sometimes
15 impossible to obtain medical evidence establishing the precise
16 date an impairment became disabling. . . . In such cases, it will
17 be necessary to infer the onset date from the medical and other
18 evidence that describe the history and symptomology of the
19 disease process." Id. The ALJ failed to comply with SSR 83-20.
20 Specifically, the ALJ failed to obtain Dr. Gordon's prior records
21 establishing that she diagnosed plaintiff with urinary
22 incontinence in August 2002, following a five year history of
23 worsening incontinence. The ALJ failed to ask Dr. Gordon or
24 other physicians to address the issue of disability onset, nor
25 did she call a medical advisor to the hearing. Moreover,
26 applying the policy guidelines of SSR 83-20 supports plaintiff's
27 argument that she has been disabled since March 13, 2003. Tr.
28 73. Plaintiff has not performed substantial gainful work since
that date, and the uncontradicted evidence establishes that
plaintiff's urinary incontinence existed on Dr. Gordon's

1 examination in August 2002, and that plaintiff reported the
2 condition had been present for about five years. Tr. 294.

3 Plaintiff next contends that the ALJ erred when she failed
4 to give valid reasons for rejecting the opinions of plaintiff's
5 treating physician, Dr. Lundquist. On July 30, 2004, Dr.
6 Lundquist opined that plaintiff had the following RFC resulting
7 from her anxiety, knee arthritis, and sacroiliitis:

8 As far as her anxiety is concerned she would have
9 difficulty with situations requiring working under
10 pressure of deadlines. As far as her back pain
11 and knee pain is concerned she would have
12 difficulty climbing stairs, walking on hard surfaces
or bending except occasionally, standing more than
thirty minutes at a time or more than two hours
in a day, or lifting more than 20 pounds and that
occasionally.

13 Tr. 161.

14 On November 16, 2006, Dr. Lindquist wrote:

15 [Plaintiff] continues to have significant problems
16 with osteoarthritis of her back and knees.
17 There has been no improvement. She continues to
suffer from chronic anxiety also. Both of
these keep her from having future employment.

18 Tr. 220.

19 On August 2, 2007, Dr. Lundquist opined that plaintiff's
20 "depression and anxiety continues unchanged," and that she had
21 the following exertional limitations:

22 She continues to have limitations of sitting for
23 no more than 30 minutes at a time and no more than
24 four hours in an eight hour day. She can stand
no more than two hours in a day.

25 Tr. 266.

26 The ALJ rejected Dr. Lundquist's opinions. Tr. 23. The
27 ALJ stated that Dr. Lundquist's assessments are not consistent
28 with his treatment records which show improvement in plaintiff's

1 mental condition, and that his opinion "involves vocational
 2 issues of which he has no expertise." Id. An ALJ may not
 3 substitute her opinion for that of a qualified physician. Bilby
 4 v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985). The ALJ also
 5 incorrectly assumes that because Dr. Lundquist noted some
 6 improvement in plaintiff's condition, that his opinions conflict
 7 with his clinical notes. See Ryan v. Commissioner of Social
 8 Security, 528 F.3d 1194, 1200-01 (9th Cir. 2008) (doctor's
 9 observation that plaintiff's condition was "improving" was
 10 insufficient to undermine the repeated diagnosis of those
 11 conditions or the doctor's more detailed report).

12 I find substantial basis in the record to credit Dr.
 13 Lundquist's opinion as true and find plaintiff disabled.

14 The remaining question is whether to remand for further
 15 administrative proceedings or simply for payment of
 16 benefits. Where the Commissioner fails to provide
 17 adequate reasons for rejecting the opinion of a
 18 treating or examining physician, we credit that opinion
 19 "as a matter of law."

20 Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995) (internal
 21 citation omitted). Here, when Dr. Lundquist's opinions are
 22 credited, it is established that plaintiff is limited to
 23 sedentary, part-time work. Tr. 220, 266.

24 2. Plaintiff's Credibility

25 For the pre-November 1, 2007, period, there is no evidence
 26 of malingering. Therefore, the ALJ may reject plaintiff's
 27 testimony about the severity of her impairments only by offering
 28 specific, clear and convincing reasons for doing so and by
 identifying what testimony is not credible and what evidence
 undermines plaintiff's complaints. The ALJ fails to meet this

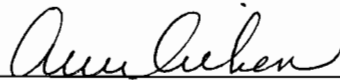
1 standard. An ALJ may reject a claimant's credibility based on
2 claimant's activities of daily living, "only if the level of
3 activity were inconsistent with Claimant's claimed limitations,
4 [then] would these activities have any bearing on Claimant's
5 credibility." Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
6 1998). Therefore, only if plaintiff's level of activity were
7 inconsistent with her claimed limitations would these activities
8 have any bearing on her credibility. The ALJ has failed to cite
9 anything about plaintiff's activity level that is inconsistent
10 with her claimed limitations. In fact, I find nothing about
11 plaintiff's cited activities of daily living that undermine her
12 allegations. Therefore, The ALJ improperly rejected her
13 testimony.

14 CONCLUSION

15 The Commissioner's decision is not based on substantial
16 evidence. Therefore, this case is reversed and remanded for
17 payment of benefits. This case is dismissed.

18 IT IS SO ORDERED.

19 Dated this 24th day of September 2010.

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24 Ann Aiken
United States District Judge